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No. 61127-5-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

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STATE OF WASHINGTON,

Respondent,

v.

TIMOTHY MARTIN,

Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR SNOHOMISH COUNTY

The Honorable Richard J. Thorpe

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# APPELLANT'S OPENING BRIEF

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A. SUMMARY OF APPEAL

Appellant, Timothy Martin, was convicted of three counts of kidnapping in the first degree and one count of robbery in the second degree. He testified at his own trial, providing a detailed explanation for his whereabouts and activities at the time of the incident, as well as the days immediately before and after. During cross-examination, the prosecutor asked a series of questions designed to elicit Mr. Martin's testimony that he had read all the discovery in the case, had been present through the entire trial, and had heard all of the State's witnesses and evidence. Mr. Martin argues that the improper cross-examination burdened the exercise of his rights under the Washington State Constitution.

B. ASSIGNMENT OF ERROR

The State's cross-examination of Timothy Martin, implying that he had tailored his testimony to fit the State's evidence, violated Mr. Martin's rights to be appear at trial, to present a defense, to testify on his own behalf, and to confront witnesses, under Article 1, Section 22 of the Washington State Constitution.

C. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

1. Article 1, Section 22. of the Washington State Constitution guarantees a criminal defendant "the right to appear

and defend in person, or by counsel,... to testify in his own behalf, [and] to meet the witnesses against him face to face." When a prosecutor elicits testimony that the defendant has had the opportunity to read all discovery and to hear all the State's witnesses and evidence before he testifies, does that line of questioning violate these rights?

2. The Court of Appeals may exercise inherent supervisory powers to maintain sound judicial practice. Where a prosecutor uses the fact of the defendant's presence at trial to accuse or imply that the defendant has tailored his testimony to fit the State's evidence, does that practice undermine the administration of fair trials, requiring the court's oversight?

D. STATEMENT OF THE CASE

1. Testimony of Timothy Martin. Timothy Martin testified that on October 12, 2006, he was released from Snohomish County Jail, having just completed a sentence for failure to report to his community corrections officer. 12/11/07RP 8. Upon his release, he attempted to report to the Everett Community Corrections Office, but was told he needed to report to Burien. Id. He then went to the south Everett apartment of Gerrie Summers, who he had never met, because he had a message to give her from a man he had

met in jail. Id. He ended up staying with Ms. Summers off and on until October 24 or 25. 12/11/07RP 8-9. Mr. Martin testified that while he stayed there he consumed methamphetamine with Ms. Summers; a number of other people were staying or hanging out at the apartment, consuming methamphetamine and oxycontin, robbing people to support their habits, and bringing stolen goods into the apartment. 12/11/07RP 9.

On October 18, 2008, he decided to go to Marysville, visit his children, and beg his ex-wife for some help. 12/11/07RP 10. He tried to hitchhike, walked most of the way, and finally got a ride into south Marysville. 12/11/07RP 11. He intended to walk to his ex-wife's house, but because it was raining and beginning to get dark, he went to a nearby library to get warm, just before 7 p.m. 12/11/07RP 11-12. At the library, he showed the librarian his identification, obtained a temporary computer guest card, and used the internet for 15 minutes. 12/11/07RP 13. After talking with the librarian, filling out a library card application, using the bathroom, and smoking a couple of cigarettes, he left the library around 7:55 p.m. 12/11/07RP 14-16. He then began walking to his ex-wife's house. 12/11/07RP 16.

Mr. Martin thought it would be a bad idea to arrive at his ex-wife's house penniless, so he decided to look for money or valuables in parked cars. 12/11/07RP 18. For approximately four hours, Mr. Martin meandered through a housing development and nearby rural areas and prowled cars, finding and taking a little money and some cigarettes. 12/11/07RP 19. Finally, Mr. Martin realized he should not show up at his ex-wife's house so late at night and she probably would not help him anyway, so he decided to find a place to spend the night. 12/11/07RP 19-20. He remembered there were sometimes abandoned vehicles in a lot next to the Thomas Machine Shop, near his ex-wife's house, and thought he could find shelter there. 12/11/07RP 20-21. On the way, he cut through the Thomas parking lot and noticed a van parked next to the building. 12/11/07RP 22. He looked in the window and saw no driver, but a purse on the seat. Id. Mr. Martin got in the van, grabbed the purse, pushed other items off the seat, grabbed the steering wheel, and tried to start the van with his "jiggler" keys. Id. The van did not start, but Mr. Martin heard a rustling noise in the back seat. 12/11/07RP 23. He turned and saw two children sitting there. Id. Alarmed, Mr. Martin jumped out of the van, taking the purse with him. 12/11/07RP 24. He later

realized he must have dropped the keys in the van. Id. He did not remember taking a Bible, but at trial surmised it had been inside the purse or he grabbed it along with the purse. 12/11/07RP 24-25.

Assuming that the van belonged to an employee's wife who was dropping off his lunch and would be right back, Mr. Martin wanted to hide as quickly as possible. 12/11/07RP 25. He went down the road a short distance and ducked into a hole in the brush. 12/11/07RP 27. There, he started going through the purse. 12/11/07RP 28. Having been awake for at least two days, Mr. Martin then fell asleep. 12/11/07RP 29.

In the morning, Mr. Martin again decided to go to his ex-wife's house. 12/11/07RP 29. Because his coat was now covered with mud, he left it behind. Id. His ex-wife's mother answered the door at her house and told Mr. Martin to wait at the back door. 12/11/07RP 31. His e-wife, Jennifer Martin, then came to the back door with a box of Mr. Martin's old clothes and told him to leave or she would call the police. Id.

Mr. Martin knew he could have an outstanding warrant for his failure to report to community custody in Burien, so he left immediately and began walking back to town. 12/11/07RP 32. On

the way, he changed out of his cold, wet clothes into some of the clothes he received from Ms. Martin. Id.

Near the Marysville Library, Mr. Martin dropped by his friend Bob's house and they smoked methamphetamine together. 12/11/07RP 33. Because Mr. Martin was worried that his ex-wife had already called the police, and the methamphetamine made him extremely paranoid, he became convinced he had to hide. Id. He noticed a wig and hat and asked Bob if he could borrow them; Bob let him take them and he left. 12/11/07RP 34.

Mr. Martin was walking near the library wearing the wig and hat when he was stopped by a police officer. Id. Worried about the warrant, Mr. Martin was initially reluctant to give his name, but after the officer told him he fit the description of a robbery suspect, he identified himself and let the officer take pictures of him with and without the wig. 12/11/07RP 35. As he left, he told the officer he could be found at Brittney Court Apartments, where Gerrie Summers lived. Id.

Mr. Martin then hitchhiked to his friend Chuck Walker's house. 12/11/07RP 37. After smoking methamphetamine with Mr. Walker and becoming even more paranoid, Mr. Martin returned to Gerrie Summers' apartment. 12/11/07RP 42-43. At some point in

the next two or three days, he told Ms. Summers about how he had found the children in the van while car prowling. 12/11/07RP 44. He also testified that several days earlier, he had told her he regretted the tattoos on his face and hand but could not afford laser removal. 12/11/07RP 45. He joked that the only way to get rid of them would be to grind them off, and asked Ms. Summers to do it with her drill, but both of them understood that this was a joke. 12/11/07RP 45-46.

2. Testimony of Sno-Isle Library System Information Technology Manager John Mulhall. Mr. Mulhall testified that the Sno-Isle Isle Library System's computer reservation system can show when library computers were used and by whom (according to the identification furnished for the reservation). 12/10/07RP 56, 61. A data sheet showed that Timothy Martin used a computer in the Marysville branch on October 18, 2006, from 7:10 to 7:25 pm. 12/10/07RP 57.

3. Testimony of Jessica Sobiano. Jessica Sobiano testified that at approximately 9 p.m. on October 18, 2006, she went to a Rite-Aid in the Smokey Point area. 12/4/07RP 14-15, 38. While she was putting her two children in the backseat of her minivan, someone grabbed her from behind and told her to get in the van or

he would "cut" her children. 12/4/07RP 20. She could not see the man's face but could tell that he was taller than her. 12/4/07RP 20. She got into the van and the man followed her and told her to drive. 12/4/07RP 21. Ms. Sobiano did not see a weapon but thought she saw him putting something shiny away with his right hand. 12/4/07RP 22.

As Ms. Sobiano drove south on I-5, the man asked her if she had any money. 12/4/07RP 24. She replied that if she did, it would be in her purse. Id. He rummaged through her purse while continuing to hold onto her arm. Id. He then asked if she had a cellular phone; she remembered that she had borrowed one from a friend. Id. The man told her to exit the freeway and then directed her onto 34th street. 12/4/07RP 25. He asked her for her address and threatened that if he didn't tell her he would find it out and "cut" one of her children, so she told him. 12/4/07RP 26. He then appeared to dial a number into the phone and repeated the address into the phone, telling her he was checking it. Id. He then told her to turn onto a dark rural road. Id.

The man asked her for her phone number but she could not remember it, so he told her to pull into a driveway so that they could switch seats and he could drive while she looked for the phone

number. 12/4/07RP 27-28. She did so, and as they switched seats she noticed a couple standing on the porch of the house at the end of the driveway. 12/4/07RP 29. Because the man had let go of Ms. Sobiano's arm to switch seats, she jumped out of the van and called for help. 12/4/07RP 29-30. She then ran to the fence, which was about five feet tall, and began climbing over it. 12/4/07RP 30. The man jumped out of the van and tried to grab her, but then got back into the van and drove away. 12/4/07RP 31. The couple Ms. Sobiano had seen on the porch helped her call 911. 12/4/07RP 32. Early on the morning of October 19, 2008, the police told her they had found her children and they were unharmed. 12/4/07RP 38.

Later, Ms. Sobiano was interviewed by Arlington Police Detective Barrett and sketch artist Val Copeland. 12/4/07RP 35. Ms. Sobiano testified that it "took forever" to work on the sketch and she felt the final product was "close" but not "quite right." 12/4/07RP 35, 37. She had not been able to get a good look at the man, but had only been able to catch a glimpse of the side of his face when he grabbed her, and glanced at him a few times while he was driving, so that she could see his left profile. 12/4/07RP 35. She told the sketch artist he was between 5'1" and 6'3", had very short light colored hair on his head and face, and light eyes.

12/4/07RP 55. She did not recall any tattoos or scars. 12/4/07RP 55, 62. (Mr. Martin is 5'11", weighs 150 pounds, and has brown hair and brown eyes, a tattoo under his left eye, and a tattoo on his hand. 12/11/07RP 6-7.)

A couple of days later, Detective Barrett showed Ms. Sobiano a photo montage, with six photos on a single sheet. 12/4/07RP 41. She chose one photo from the montage and felt "certain" he was the man. 12/4/07RP 42. She then took Detective Barrett through the route she had driven that night, and as she did, became even more "positive" of her choice. Id.

Later, Detective Barrett presented her with a second montage, this time with each photograph presented individually. 12/4/07RP 43-44. This time, Ms. Sobiano could not be sure of her choice. 12/4/07RP 44. She felt that Number 5 looked similar to her kidnapper, but was not positive and did not want to accuse an innocent person. Id.

4. Testimony of Michele Rubatino. Michele Rubatino testified that she was at home watching television between 8:15 and 8:30 p.m. on October 18, 2006, when she noticed a vehicle pulling up slowly in front of her house. 12/4/07RP 71-72. She and her husband went to the front door and heard a woman screaming

for help. 12/4/07RP 75. She then saw Ms. Sobiano try to climb the fence, saying, "he's going to take my babies," and a man follow her and try to pull her off the fence 12/4/07RP 76-77. The man was of a heavier build than the woman and appeared to be wearing a sweatshirt and baggy pants, but Ms. Rubatino could only see their silhouettes. 12/4/07/RP 77. Ms. Rubatino yelled at the man and he jumped in the van and drove away. 12/4/07RP 78. By this time, Ms. Sobiano had made it over the fence and ran to the porch. 12/4/07RP 79. Ms. Rubatino called 911, gave the telephone to Ms. Sobiano, and then left in her own car to search, unsuccessfully, for the van. 12/4/07RP 81. She testified the police arrived about 45 minutes later. 12/4/07RP 84.

5. Testimony of Richard Evans. Richard Evans testified he is employed at Thomas Machine Shop and Foundry in Marysville. 12/4/07RP 119. On October 19, 2006, he arrived at work at approximately 4:40 a.m. 12/4/07RP 120-22, 129. As he pulled into the parking lot, he noticed a van parked on a strip of grass next to the shop, where he had never seen a vehicle parked before. 12/4/07RP 122. When he mentioned it to his co-workers, he recalled seeing an Amber Alert on a traffic sign on I-5, which described a silver Chrystler Town & Country van. 12/4/07RP 121-

22. Mr. Evans and his co-workers checked the newspapers, found the license plate in the Amber Alert, and saw that the van in their lot had the same license number. 12/4/07RP 123. Another employee called 911. 12/4/07RP 124. When the police arrived, they found the two children, unharmed, in the van. 12/4/07RP 125.

6. Testimony of Jennifer Martin. Jennifer Martin testified that Timothy Martin is her ex-husband, who she had not seen in several years before October 2006. 12/4/07RP 51-52. On October 19, between 9:30 and 10 a.m., she was at work, which is next door to her home, when her mother told her that he was at the house. 12/4/07RP 61-62. Ms. Martin went home and saw him standing by the back door, wet and "acting strange." 12/4/07RP 62-63. He told her he needed help and asked if he could come in for a minute to get warm. 12/4/07RP 66. She told him to leave or she would call the police. Id. She did not give him any clothing, but a box of old clothes, including some from her teenage son, was already on the back porch. 12/4/07RP 70. Mr. Martin left immediately and Ms. Martin did not call the police. Id.

7. Testimony of Marysville Police Officer Jeff Vandenberg. On October 19, 2006, Officer Vandenberg responded to a report of a suspicious man in the bushes near the Marysville Library.

12/6/07RP 12-13. He encountered Mr. Martin walking on the sidewalk about eight blocks away from the library, wearing a long, black, "mullet"-style wig, blue jeans, and a dark blue sweatshirt. 12/6/07RP 15, 17. Officer Vandenberg made fun of Mr. Martin's wig; Mr. Martin initially asserted it was his real hair but then admitted it was a wig, and made some reference to Halloween. 12/6/07RP 18. Officer Vandenberg found Mr. Martin nervous but cooperative. 12/6/07RP 19. Although he did not have identification, he told the officer his name and allowed him to take photographs of him, with and without the wig, with his personal digital camera. 12/6/07RP 20, 24. (Officer Vandenberg deleted the photographs about a week later. 12/6/07RP 25.) As Mr. Martin walked away, he said, "If you need me I'll be at 8th Ave and 128th Street." 12/6/07RP 36.

8. Testimony of Gerrie Summers. Ms. Summers testified that Mr. Martin stayed with her, off and on in October. 12/6/07RP 57-58. Other people were staying there around the same time, but she testified there were no drugs in her apartment and building management never confronted her about it.[1] 12/6/07RP 58, 88-89.

[1] However, apartment manager Jennifer Evanger testified that she had warned Ms. Summers that the frequency of police contacts at her apartment and the number of unauthorized guests could result in her eviction. 12/10/07RP 85.

Ms. Summers testified the last time Mr. Martin returned to her apartment, he appeared "agitated" and "paranoid." 12/6/07RP 60-61. He asked her to sand the tattoo off his hand with a drill motor and disks. 12/6/07RP 61. One night he said something about "a woman in a van...then he looked back and saw kids." 12/6/07RP 62-63. Ms. Summers had not been paying attention to what Mr. Martin was saying immediately before this phrase, had not heard about the incident in Marysville and did not know what he was talking about. 12/6/07RP 62-63. For some reason she said, "that's kidnapping, isn't it?" and he said something to the effect of, "yeah, it's pretty bad." 12/6/07RP 63. Ms. Summers identified the keys found in the van and the coat found in the bushes as belonging to Mr. Martin. 12/6/07RP 70, 73.

9. Testimony of Arlington Police Detective Jason Rhodes. Detective Rhodes testified that on October 25, 2006, he and Detective Barrett searched the area where the van was found. 12/6/07RP 195. He found a Bible with the name Jessica Samuelson (Ms. Sobiano's maiden name) on the side of 41st Street. 12/6/07RP 199. Nearby, just inside a "burrowed" hole in the

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The situation did not improve, and Ms. Summers was evicted in April 2007. 12/10/07RP 84. Ms. Evanger testified she had heard numerous reports of drug and criminal activity at Ms. Summers' apartment from the police and other tenants. 12/10/07RP 85, 89.

bushes, he found a razor and lip gloss, a little further back he found a dark Carhartt jacket and light colored pants, and further, Ms. Sobiano's purse and a black memo book containing Mr. Martin's identification and temporary library card. 12/6/07RP 204-11; 12/7/07RP 7-9.

10. Testimony of Washington State Patrol Forensic Scientist Greg Frank. Mr. Frank testified that he found Mr. Martin's DNA on the van's steering wheel and the keys found in the van. 12/7/07RP 173, 191. Additional DNA found on the steering wheel and dashboard did not match samples collected from Mr. Martin, Ms. Sobiano, or the children (the only comparative samples provided to the crime lab). 12/7/07RP 174, 176.

11. Testimony of Arlington Police Officer Mike Gilbert. Officer Gilbert testified that he contacted Ronald Vincent after Ms. Sobiano identified Mr. Vincent in the first photo montage. 12/5/07RP 16. Mr. Vincent told Officer Gilbert that on October 18, he had worked 16 to 18 hours in Seattle. Id. Officer Gilbert asked Mr. Vincent to fax him records of his work schedule on that date, but he failed to do so. 12/5/07RP 16, 21.

12. Testimony of Ronald Vincent. Mr. Vincent testified he did fax the employment records to Officer Gilbert shortly after

speaking to him. 12/10/07RP 42. When Detective Peter Barrett requested them, Mr. Vincent faxed them again, a few days before his testimony. 12/07RP 42-43. Mr. Vincent also acknowledged he had been subpoenaed to testify on November 30, 2007, but did not appear because he erroneously believed he was not required to. 12/07RP 56-57. He was not aware of further attempts to contact him because his telephone service had been stopped for non-payment. 12/10/07RP 57. Consequently a material witness warrant had been issued for him. 12/10/07RP 54.

Mr. Vincent testified that on October 18, 2006, he was working at the King County administrative building in downtown Seattle. 12/10/07RP 43. Mr. Vincent does not use a punch clock or report to anyone when he leaves work and was not sure of his hours that day. 12/10/07RP 43-44, 46. Mr. Vincent is frequently alone at the workplace; he surmised that the last person he worked with that day was probably his supervisor, who could have left any time between 2:30 and 9 p.m. 12/10/07RP 44-45, 49.

13. Conviction and Sentence. The Prosecuting Attorney for King County charged Timothy Martin with three counts of kidnapping in the first degree and two counts of robbery in the second degree. After a jury trial before the Honorable Richard J.

Thorpe, Mr. Martin was convicted as charged and sentenced to 344 months. This appeal timely follows.

E. ARGUMENT

1. IMPROPER CROSS-EXAMINATION BY THE PROSECUTOR VIOLATED MR. MARTIN'S RIGHTS UNDER THE STATE CONSTITUTION.

a. Prosecutors have special duties which limit their advocacy. The prosecutor, as a quasi-judicial officer, must seek a verdict free of prejudice and based upon reason. State v. Charlton, 90 Wn.2d 657, 664, 585 P.2d 142 (1978); State v. Huson, 73 Wn.2d 660, 663, 440 P.2d 192 (1968), cert. denied, 393 U.S. 1096 (1969). The court in Huson stated:

> [The prosecutor] represents the state, and in the interest of justice must act impartially. His trial behavior must be worthy of the office, for his misconduct may deprive the defendant of a fair trial. Only a fair trial is a constitutional trial. . . . We do not condemn vigor, only its misuse. . . . No prejudicial instrument, however, will be permitted. His zealousness should be directed to the introduction of competent evidence. . . .

Huson, 73 Wn.2d at 663 (citation omitted); see also, State v. Reed, 102 Wn.2d 140, 147, 684 P.2d 699 (1984) (citation omitted) (prosecutor has a special responsibility "to act impartially in the interest only of justice").

To determine whether prosecutorial comments constitute misconduct, the reviewing court must decide first whether such comments were improper and, if so, whether a "substantial likelihood" exists that the comments affected the jury. Reed, 102 Wn.2d at 145. The burden is on the defendant to show that prosecutorial comments rose to the level of misconduct, requiring a new trial. State v. Stith, 71 Wn. App. 14, 19, 856 P.2d 415 (1993).

Here, Mr. Martin testified on his own behalf. During cross-examination, the following exchange took place:

> PROSECUTOR: And you've had the advantage of hearing all the testimony before you testified today, correct?
> MR. MARTIN: Obviously, I have been sitting in that seat the whole time, yes.
> PROSECUTOR: And you've also had the advantage of hearing all the testimony before you testified today, correct?
> MR. MARTIN: No, I didn't know what anybody was going to say ahead of time.
> PROSECUTOR: You didn't get to read the police reports?
> MR. MARTIN: I got to read the police reports.
> PROSECUTOR: And you didn't get to read the witness statements?
> MR. MARTIN: I read witness statements, yes.
> PROSECUTOR: And you weren't allowed to bring those reports and statements with you to court?
> MR. MARTIN: I read everything involved, yes.
> PROSECUTOR: And you've had what, a little over a year to concentrate on what people were going to say, did you?

12/11/07RP 74-75.

At this point, defense counsel objected. 12/11/07RP 75. Outside the presence of the jury, he argued that the prosecutor was making an impermissible comment on Mr. Martin's right to be represented by counsel, which necessarily includes the right to confer with counsel about discovery. 12/11/07RP 75-76. The court overruled the objection, and cross-examination resumed. 12/11/07RP 78. The prosecutor continued:

> Mr.Martin, when we left on break, we have been talking about whether or not you had a year to think about your testimony. Do you remember that?
>
> MR. MARTIN: I have been in custody for 13 months.
>
> PROSECUTOR: That wasn't my question. My question is, you've known this was coming up for a year, correct?
>
> MR. MARIN: I thought of nothing about this, yes. I was ready to go to trial a year ago. I am not the one who made it last this long.
>
> ...
>
> PROSECUTOR: So in the pendency of this trial, you've had access of what the evidence was?
>
> MR. MARTIN: I've read the police reports, I've read your discovery, yes.
>
> PROSECUTOR: And you've heard all the testimony so far?
>
> MR. MARTIN: So far, yes.
>
> PROSECUTOR: And you knew all that before you testified?
>
> MR. MARTIN: Yes.
>
> PROSECUTOR: And so you knew exactly where your DNA had been found in the car?

12/11/07RP 78-79.

Defense counsel again objected, pointing out that the State only obtained DNA evidence after several months. 12/11/07RP 80. The court overruled the objection and permitted the prosecutor to ask Mr. Martin if he had known since April that his DNA was found on the keys and since August that his DNA was found on the steering wheel. 12/11/07RP 81. Mr. Martin replied that he had.

b. The prosecutor improperly elicited testimony that violated Mr. Martin's right to appear, to present a defense, to testify in his own behalf, and to confront the witnesses against him. Like the Sixth Amendment to the United States Constitution, Art. 1, § 22 of the Washington State Constitution provides criminal defendants the right to be present at trial, to present a defense, to testify, and to confront and cross-examine the witnesses against him. In relevant part, Art. 1, § 22 states,

> In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel,... to testify in his own behalf, [and] to meet the witnesses against him face to face.

Previously, Washington courts have held that the State violated the Sixth Amendment by implying that a testifying defendant tailored his testimony to the State's evidence. In State v.

Johnson, the prosecutor argued in rebuttal that the defendant was "the only one witness that could watch the entire proceeding take place, to fit his testimony to suit the evidence that was entered earlier." 80 Wn. App. 337, 340, 908 P.2d 900 (1996), rev. denied, 129 Wn.2d 1016, 917 P.2d 575 (1996). He further argued that the defendant had the entire duration of the trial "to decide what his testimony would be" and that he "fit his testimony, to tailor his testimony to what came before" and that, having heard all the State's evidence, he could "keep in mind those things to account for." Id. at 340-41. The Supreme Court held that these remarks, which the prosecutor made even though the court had sustained defense objections, violated the defendant's constitutional rights. Id. at 341.

> The prosecutor's comments about the defendant's unique opportunity to be present at trial and hear all the testimony against him impermissibly infringed his exercise of his Sixth Amendment rights to be present at trial and confront witnesses. He did not merely argue inferences from the defendant's testimony, but improperly focused on the exercise of the constitutional right itself.

Id. Cf. State v. Smith, 82 Wn. App. 327, 334-35, 917 P.2d 1108 (1996), holding the prosecutor's remarks that the defendant had a "unique opportunity to be present at trial and hear all the testimony

against him" did not violate his Sixth Amendment rights because they were not "focused on the exercise of the right itself."

The United States Supreme Court has since overruled this holding as to the Sixth Amendment. In Portuondo v. Agard, the prosecutor argued that the defendant had the "benefit" and the "advantage" of listening to all the evidence before testifying, enabling him to decide "what am I going to say and how am I going to say it? How am I going to fit into the evidence?" 529 U.S. 61, 64, 120 S.Ct. 1119, 146 L.Ed.2d 47 (2000). The Court held that these remarks did not burden the Sixth Amendment rights to presence and confrontation or the Fifth and Sixth Amendment right to testify on his own behalf; a historical analysis revealed no foundation for the claims, and the prosecutor properly called attention to the defendant's presence during trial in order to impeach his credibility. Id. at 67, 69. In a similar case, where the prosecutor argued in rebuttal that the defendant had the opportunity to review all discovery, listen to all the testimony, and "tailor his story to fit the evidence," the Washington Supreme Court noted that Portuondo overruled Johnson. State v. Miller, 110 Wn. App. 283, 285, 40 P.3d 692, 693 (2002).

However, Johnson, Smith, and Miller did not address the State Constitution at all. Portuondo, of course, does not decide the issue of whether a prosecutor's argument that a defendant has "tailored" his testimony violates the defendants rights under Art. 1, § 22 of the Washington State Constitution.

c. The Washington Constitution offers broader protections than the Sixth Amendment. This Court should find that Art. 1, § 22 provides greater protection for the rights to be present, mount a defense, testify, and confront witnesses than does the Sixth Amendment. State v. Gunwall set forth six factors to guide the court in determining whether a state constitutional protection affords greater rights than a similar federal provision.[2] 106 Wn.2d 54, 720 P.2d 808 (1986).

*i. The plurality opinion in State v. Foster illustrates why Art. 1, § 22 provides a greater confrontation right than the Sixth Amendment.* Because the Washington Supreme Court has already recognized the confrontation right guaranteed by

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[2] The six factors are: (1) the textual language of the state constitution; (2) significant differences in the texts of parallel provisions of the federal and state constitutions; (3) state constitutional and common law history; (4) preexisting state law; (5) differences in structure between the federal and state constitutions; and (6) matters of particular state interest or local concern. Gunwall, 106 Wn.2d at 61-62.

the state constitution is broader than that guaranteed by the federal constitution, a full analysis as set for the in Gunwall is not required as to the confrontation clause. See State v. Young, 123 Wn.2d 173, 867 P.2d 593 (1994). Nevertheless, the analysis demonstrates the greater state constitutional protections of the right to confrontation require that a criminal defendant may not be convicted based only upon hearsay declarations of witness who does not testify at trial.

In State v. Foster, the majority held that "*for purposes of determining whether RCW 9A.44.150 comports with the confrontation clause*... [the] state right to confrontation and [the] Sixth Amendment right to confrontation [are] identical." 135 Wn.2d 441, 466, 957 P.2d 712 (1998). However, a plurality, consisting of a four-justice dissent and a one-justice concurrence/dissent ,agreed the provisions of Art. 1, § 22 provide a broader confrontation right than that afforded by the Sixth Amendment. Id. at 473-498. See also State v. Smith, 148 Wn.2d 122, 131, 139-40, 59 P.2d 74 (2003) (although discussing Foster, the Court did not address Art. 1, § 22 because appellant did not provide a Gunwall analysis, but reversed the conviction under the Sixth Amendment.)

After conducting a Gunwall analysis, Justice Johnson's dissent concluded that Art. 1, § 22 "has a different meaning than the Sixth Amendment" and the "language of the state confrontation clause is absolute and allows for no 'flexibility,' dependent upon the significant of the interest involved." Id., at 483 (Johnson, J., dissenting). Therefore, the four justices concluded, because nothing short of face-to-face confrontation will suffice, permitting a witness to testify by closed circuit television deprived the defendant of his right to confront the witness. Id. at 494 (Johnson, J. dissenting).

Justice Alexander's concurrence/dissent agreed in substantial part with Justice Johnson's Gunwall analysis, but disagreed with the ultimate conclusion that the term "face-to-face" must be rigidly and literally defined. Id. at 474 (Alexander, J., concurring in part and dissenting in part). Opting instead for a "more flexible and enduring view," Justice Alexander found modern technological advances could provide "the functional equivalent" of the fact-to-face confrontation required by Art. 1, § 22. Id.

The principle point upon which Justice Alexander relied in rejecting a too-literal reading of "face-to-face" was that "[n]either [the state nor federal confrontation] clause has been read literally,

for to do so would result in eliminating all exceptions to the hearsay rule." Foster, 135 Wn.2d at 474, citing State v. Ryan, 103 Wn.2d 165, 691 P.2d 197 (1984), citing Ohio v. Roberts, 448 U.S. 46, 100 S.Ct. 2431, 65 L.Ed.2d 597 (1980). Justice Alexander chided the dissent for failing to recognize this implication of its opinion. Id.

But in the end, it was not a literal reading of the state confrontation clause that limited the admission of the hearsay Justice Alexander sought to protect, but rather the Sixth Amendment itself. In Crawford, the United State Supreme Court overruled Ohio v. Roberts and held that the admission of any out-of-court testimonial statement violates the federal confrontation clause unless the defendant has the opportunity to cross-examine the declarant or the declarant is unavailable. 541 U.S. at 68-69. Thus, the main support for a "more flexible and enduring" definition of "face-to-face" confrontation provided by Justice Alexander is gone.

Foster clearly addresses a different issue than the one presented in this case. In Foster, the defendant was denied face-to-face confrontation, but the witness testified via closed circuit television and he was therefore able to cross-examine the witness. Mr. Martin, in contrast, was able to physically confront and cross-

examine the witnesses, but the prosecutor exploited his exercise of that right, transforming it into "an automatic burden on his credibility." Portuondo, 529 U.S. at 76, 79 (Ginsberg, J., dissenting).. As Johnson and similar cases demonstrate, this case clearly implicates the constitutional protections of Art. 1, § 22.

*ii. The Gunwall factors demonstrate Washington's Constitution guarantees the right to be present, testify, and confront witnesses, violated by the improper cross-examination.* A review of the six Gunwall factors demonstrates that the Washington Constitution provides different and broader protections of the right to be present, testify, and confront witnesses than does the Sixth Amendment.

A. Factor One – Textual Language of the Washington Constitution. As to the right to be present and testify, the textual differences between the two constitutions could not be more clear. The Washington Constitution expressly provides for a defendant's right "to appear and defend in person" and "to testify in his own behalf." Wash. Const. art. 1, § 22. This starkly contrasts with the federal constitution as the federal rights to appear in person and to present a defense are merely derived from the defendant's right to confront witnesses and due process. United States v. Gagnon, 470

U.S. 522, 526, 105 S.Ct. 1482, 84 L.Ed.2d 486 (1985); Faretta v. California, 422 U.S. 806 819, n. 15, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975); Davis v. Alaska, 415 U.S. 308, 320, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974).

Similarly, the right to testify is not spelled out in any amendment but is derived from the Sixth and Fourteenth Amendments and as a corolloray to the Fifth Amendment's guarantee of freedom from self-incrimination. Rock v. Arkansas, 483 U.S. 44, 51, 107 S.Ct. 2704, 97 L.Ed.2d 37 (1987), citing Faretta, 422 U.S. t 819, n. 15; Ferguson v. Georgia, 365 U.S. 570, 602, 81 S.Ct. 756, 5 L.Ed. 783 (1961).

The text of Art. 1, § 22 also demonstrates the drafters intended the right to confrontation to be different than that of the existing Sixth Amendment. While the Sixth Amendment provides a criminal defendant the right "to be confronted by the witnesses against him," Art. 1, § 22 more explicitly speaks of "the right . . . to meet the witnesses against him face to face."

Washington's Art. 1, § 22 is modeled after the Oregon and Indiana Constitutions. Foster, 135 Wn.2d at 460, 488, citing Journal of the Washington State Constitutional Convention, 1889, at 511 n.37. (Beverly P. Rosenow ed., 1962). In reviewing its state

confrontation clause, the Indiana Supreme Court looked to the current and historical meaning of the term "face to face."[3] Brady v. State, 575 N.E.2d 981, 987 (Ind. 1991). The Indiana court noted that the term is an adverbial phrase modifying "to meet" and thus describes how an Indiana criminal defendant and the State's witnesses are to meet. In the first standard English language dictionary, appearing in 1755, the term "face to face" means "without the interposition of other bodies." In an 1856 dictionary, it was defined as the "state of confrontation. The witnesses were presented face to face." Id. And in 1928, the first definition is "looking one another in the face." Id. Based upon these definitions, the Indiana Supreme Court concluded that the state constitutional provision had an unmistakable meaning that was more concrete and detailed than the Sixth Amendment. Id.

The Foster dissent also found a more concrete interpretation of the right to confrontation in the Washington Constitution. 135 Wn.2d at 483 (Johnson, J., dissenting). The text of Art. 1, § 22 and its common meaning thus support the conclusion that Washington's Constitution must be independently interpreted. Id. at 483-84.

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[3] Indiana Const. Art. 1, § 13, reads in pertinent part, "In all criminal prosecutions, the accused shall have the right . . . to meet the witnesses face to face."

B. Factor Two – Significant Differences in Texts of Parallel Provisions. The textual differences between Art. 1, § 22 and the Sixth Amendment mandate an independent interpretation of the state constitutional provision. Foster, 135 Wn.2d at 484-86. The framers of the Washington Constitution were certainly aware of the federal constitution, and they specifically drafted and adopted different language. Id. at 485, citing Robert F. Utter, Freedom and Diversity in a Federal System: Perspectives on State Constitutions and the Washington Declaration of Rights, 7 U. Puget Sound L. Rev. 491, 515 (1984) and Lebbeus J. Knapp, The Origin of the Constitution of the State of Washington, 4 Wash. Hist. Q., No. 4, at 246 (1913).

As noted above, the federal constitution has no provisions parallel to Art. 1, § 22, guaranteeing the right to appear in person and to testify on one's own behalf. In addition to these, Art. 1, § 22 lists other rights not included in the Sixth Amendment, such as the right to have a copy of the charge and to appeal. Id. at 485-86. And while the Sixth Amendment does not explain how confrontation is to be achieved, Art. 1, § 22 specifies the method of confrontation – "face to face." The state constitution is thus more detailed, again

demonstrating a different interpretation than that given to the Sixth Amendment. Foster, 135 Wn.2d at 486.

C. Factor Three – State Constitutional and Common Law History. Little is known about the history of the drafting of Art. 1, § 22. Foster, 135 Wn.2d at 722, 734-35; State v. Silva, 107 Wn.App. 605, 619, 27 P.3d 663 (2001). Logically, the framers of the Washington Constitution did not intend Art. 1, § 22 to be interpreted identically to the federal Bill of Rights, since they copied Art. 1, § 22 from a state constitution and the federal Bill of Rights did not then apply to the states. Utter, 7 U. Puget Sound L. Rev. at 496-97; Silva, 107 Wn.App. at 672-73.

Oregon has independently interpreted its identical confrontation clause to require witness unavailability before hearsay may be admitted when the defendant has not had a prior opportunity to cross-examine the witness.[4] State v. Moore, 334 Or. 328, 49 P.3d 785 (2002) retaining two-part test from Ohio v. Roberts(, despite erosion of unavailability requirement in later United States Supreme Court opinions); State v. Campbell, 299 Or.

[4] Oregon Const. Art. 1, § 11, reads in pertinent part: "In all criminal prosecutions, the accused shall have the right . . . to meet the witnesses face to face . . . "

633, 706, 705 P.2d 694 (1985) (court must be satisfied witness is not available before hearsay is admitted in criminal trial).

As early as 1902, the Washington Supreme Court explained that Art. 1, § 22 provided a criminal defendant due process, including right to meet the witnesses against him face to face and cross-examine those witnesses in open court. State v. Stentz, 30 Wash. 135, 142, 70 P.241 (1902).

> Under the constitutional provisions defining the rights of accused persons, the appellant had the right, not only to be tried by an impartial jury, but to defend in person and by counsel, and to meet the witnesses against him face to face. Art. 1, § 22, Const. This means that the examination of such a witness shall be in open court, in the presence of the accused, with the right of the accused to cross-examine such witness as to facts testified to by him. . . ."

Id. Noting this language, the Foster plurality held that state constitutional and common law history require an independent interpretation of Art. 1, § 22. Foster, 135 Wn.2d at 486-93.

D. Factor Four – Preexisting Washington Law. Article 1, § 22 was revised by amendment 10, but the relevant portion of the original 1889 text was unchanged, still explicitly providing the accused with "the right to appear and defend in person." Historical Notes to Const. art. 1, § 22. Contrast with the historical analysis found in Portuondo: Although Maine was the first

state to make defendants competent witnesses (in 1864), the Portuondo Court noted that other states "attempted to limit a defendant's opportunity to tailor his sworn testimony by requiring him to testify prior to his own witnesses." 529 U.S. at 66, citing 3 J. Wigmore, Evidence §§ 1841, 1869 (1904); Ky. Stat., ch. 45, § 1646 (1899); Tenn. Code Ann., ch. 4, § 5601 (1896). Yet in 1889, Washington had no such requirements, and the right to be present and testify at trial was already established in our Constitution.

Thus, preexisting Washington law demonstrates that the framers intended to enshrine and protect the rights of a criminal defendant to be appear, to present a defense, to testify, and to confront witnesses face-to-face; allowing the State to burden these rights would offend the framer's purpose.

E. Factor Five – Differences in structure between the state and federal constitutions. The United States Constitution is a grant of limited power to the federal government, whereas the Washington Constitution imposes limitations on the otherwise plenary power of the state. Foster, 135 Wn.2d at 458-59; Gunwall, 106 Wn.2d at 61. This factor supports an independent analysis. Id.

F. Factor Six – Matters of particular state interest or concern. The regulation of criminal trials in Washington is a matter of particular state concern. State v. Boland, 115 Wn.2d 571, 576, 800 P.2d 1112 (1990); Gunwall, 106 Wn.2d at 62. This includes the protection provided to criminal defendants by the confrontation clause. Foster, 135 Wn.2d at 494.

*iii. Mr. Martin's state constitutional right to be present, testify, and confront the witnesses against was infringed upon when the prosecutor improperly focused on his exercise of those rights.* As this Court held in Johnson, when the State implies that a defendant has tailored his testimony by drawing the jury's attention to the fact that a defendant has been present throughout his entire trial, testified on his behalf, and listened to the testimony of the witnesses against him, the State impermissibly burdens the exercise of those rights. 80 Wn. App. at 341. Although Johnson's Sixth Amendment holding has been overturned, its reasoning is still sound, and in fact even stronger under the broader protections of Art. 1, § 22.[5]

[5] See State v. Hart, 303 Mont. 71, 15 P.3d 917 (2000) (Montana Supreme Court, although declining to decide the issue because appellant failed to meet the standard required for review, found that the Montana Constitution's guarantee of the right to "meet witnesses against him face to face" may have been implicated by prosecutor's tailoring accusations.)

Accordingly, this Court should review the issue, given the explicit rights guaranteed by the Washington Constitution, an issue not decided by Miller or Johnson, and find the prosecutor's improper cross-examination violated Mr. Martin's rights, requiring reversal. Johnson, 80 Wn. App. at 339-40, n.1.

d. Because the error is not harmless, reversal is required. The error in this case was not harmless, as the evidence against Mr. Martin was not overwhelming. As in Johnson, to determine whether evidence is overwhelming, this Court must "examine whether the defendant's credibility was at issue because he testified and whether his exculpatory story was plausible." Id. at 342.

Mr. Martin's credibility was the linchpin of his defense. The State's physical evidence was compelling, but was all easily explained by Mr. Martin testimony, if the jury believed him. Yet evidence outside of his testimony called the State's theory into question.

The computer data sheet showed that he was at Marysville Library at least as late as 7:25 p.m. 12/10/07RP 57. Jessica Sobiano testified she was kidnapped at 9pm, allowing Mr. Martin a maximum of one hour and 25 minutes to walk to the Rite Aid.

12/4/07RP 38. Detective Barrett testified that depending on the route, this would be a distance of 7.28 to 8.5 miles. 12/11/07RP 147. Michele Rubatino, on the other hand, testified that she first noticed the van in her driveway between 8:15 and 8:30 p.m., and was confident of the time because she remembered which television program she was watching. 12/4/07RP 71-72. Detective Barrett testified it took him nine minutes to drive from Rite Aid to the Rubatino's house. 12/7/07RP 68. If Ms. Rubatino's memory was correct, then Mr. Martin had no more than one hour, at most, to walk roughly eight miles to Rite Aid, kidnap Ms. Sobiano and her children, and then drive across the freeway and backroads to the Rubatino residence. The State did not suggest how this could have been possible.

Arguably, the most incriminating testimony came from Gerrie Summers. However, Ms. Summers also claimed she knew nothing of drugs or crime in her apartment, despite the apartment manager's testimony of tenant complaints and police activity so frequent and unrelenting that she was forced to evict Ms. Summers as a result. 12/6/07RP 58, 88-89; 12/10/07RP 85, 89.

In the end, the jury's task was to evaluate Mr. Martin's testimony, which converged with the State's office on a number of

points: his habit of car-prowling, which led him to enter the van and leave his keys on the floor and traces of DNA on the steering wheel; his possession of the purse, which he freely admitted he intended to steal; his night in the bushes after two or three days fueled by methamphetamine and deprived of sleep; his unexpected visit to his estranged ex-wife, when he was desperate for money; his bizarre behavior while visiting friends in Marysville, with whom he was smoking methamphetamine and becoming increasingly paranoid; his costumed encounter with Officer Vandenberg, at a time when he was convinced there was a warrant out for his arrest; and his paranoid behavior at Gerrie Summers' residence, understandable in an environment which an impartial witness characterized as rife with drugs and crime.

Additional factors supported Mr. Martin's innocence: Ms. Sobiano's difficulty in identifying him, discrepancies between her description of her kidnapper and Mr. Martin's actual appearance (most notably the tattoos on his face and hand), and her positive identification of another man who was never fully investigated by the police.

Mr. Martin proposed a simple explanation for the similarities between his version of events and the State's theory: his testimony

was true. The assessment of his credibility was for the jury alone. But the prosecutor attempted to tip the scales by highlighting for the jury the fact that Mr. Martin had seen the discovery, sat through the trial, and heard all the evidence. The sole purpose of this line of questioning was to accuse Mr. Martin of tailoring his testimony, and it was possible only because Mr. Martin had exercised his constitutional rights under Art. 1, § 22. This improper cross-examination therefore exacted a price for the exercise of his rights, tipping the balance of credibility towards the State. The convictions should therefore be reversed.

2. IN THE ALTERNATIVE, THIS COURT SHOULD EXERCISE ITS SUPERVISORY POWER TO CURB UNFAIR AND REPUGNANT GOVERNMENT ACTION.

The Portuondo Court specifically invited state courts to continue to review the issue of whether a prosecutor may argue or imply that a defendant has tailored his testimony to fit the State's evidence.

> Our decision, in any event, is addressed to whether the comment is permissible as a constitutional matter, and not to whether it is always desirable as a matter of sound trial practice. The latter question, as well as the desirability of putting prosecutorial comment into proper perspective by judicial instruction, are best left to trial courts, and to the appellate courts which routinely review their work.

Portuondo, 529 U.S. at 73, n.4.

Some state courts have taken up the invitation. Most recently, the New Jersey Supreme Court affirmed its bright-line rule: "a blanket prohibition against a prosecutor's 'drawing the jury's attention to defendant's presence during trial and his concomitant opportunity to tailor his testimony.'" State v. Feal, 194 N.J. 293, 298, 944 A.2d 599 (2008), quoting State v. Daniels, 182 N.J. 80, 98, 861 A.2d 808 (2004).

In Daniels, the prosecutor stated in closing argument:

> Now, I said that the defendant in his testimony is subject to the same kinds of scrutiny as the State's witnesses. But just keep in mind, there is something obvious to you, I'm just restating something you already know, which is all I do in my summation, *the defendant* [***12] *sits with counsel, listens to the entire case and he listens to each one of the State's witness[es], he knows what facts he can't get past.* The fact that he was in the SUV. The fact that there's a purse in the car. The fact that a robbery happened. *But he can choose to craft his version to accommodate those facts.*

Id. at 87 (emphasis in the original). Defense counsel did not object to these remarks. Id.

The New Jersey Supreme Court first noted that under Portuondo, the prosecutor's remarks were permissible under the federal constitution. Id. at 88. The Court also declined to address

the issue under the state constitution. Id. However, the Court discussed approvingly the Portuondo dissent and concurrence:

> Justice Ginsburg condemned the majority for "transform[ing] a defendant's presence at trial from a Sixth Amendment right into an automatic burden on his credibility." The dissent advocated a "carefully restrained and moderate" approach and would have permitted the prosecutor to argue, during summation, that the defendant tailored his testimony only if there was evidence that supported that contention.

Daniels, 182 N.J. at 91, quoting Portuondo, 529 U.S. at 76, 79 (Ginsberg, J., dissenting).

> The defendant's Sixth Amendment right "to be confronted with the witnesses against him" serves the truth-seeking function of the adversary process. Moreover, it also reflects respect for the defendant's individual dignity and reinforces the presumption of innocence that survives until a guilty verdict is returned. The prosecutor's argument in this case demeaned that process, violated that respect, and ignored that presumption. Clearly such comment should be discouraged rather than validated.
>
> The Court's final conclusion, which I join, that the argument survives constitutional scrutiny does not, of course, deprive States or trial judges of the power either to prevent such argument entirely or to provide juries with instructions that explain the necessity, and the justifications, for the defendant's attendance at trial.

Daniels, 182 N.J. at 91-92, quoting Portuondo, 529 U.S. at 76 (Stevens, J., concurring).

The Court noted that it had a responsibility "at times to exercise its supervisory authority over criminal trial practices in order to curb government actions that are repugnant to the fairness and impartiality of trials," and determined that function was warranted where prosecutorial misconduct is so egregious as to interfere with a fair trial. Daniels, 182 N.J. at 96 (internal citations omitted). The Court observed that a testifying defendant, like any other witness, is compelled to tell the truth, but at the same time, "a criminal defendant is not simply another witness. Those who face criminal prosecution possess fundamental rights that are 'essential to a fair trial,'" including the right to be present at trial, to hear the evidence and confront the witnesses against him, to present evidence and witnesses in his defense, and to testify on his own behalf. Id. at 97-98 (internal citations omitted). Therefore, the Court found,

> Prosecutorial comment suggesting that a defendant tailored his testimony inverts those rights, permitting the prosecutor to punish the defendant for exercising that which the Constitution guarantees. Although, after Portuondo, prosecutorial accusations of tailoring are permissible under the Federal Constitution, *we nonetheless find that they undermine the core principle of our criminal justice system--that a defendant is entitled to a fair trial.*

Id. at 98 (emphasis added).

The Court went on to distinguish between "generic accusations... when the prosecutor, despite no specific evidentiary basis that defendant has tailored his testimony, nonetheless attacks the defendant's credibility by drawing the jury's attention to the defendant's presence during trial and his concomitant opportunity to tailor his testimony" and specific accusations, based on evidence in the record. Id. Even with evidence of tailoring, the Court held, the prosecutor may not "refer explicitly" to the defendant's exercise of his right to be present at trial and hear the evidence against him. Id. at 99. The Court also clarified that the same rule would apply to cross-examination as well as closing arguments. Id. Thus, although there was evidence in the record to support an inference of tailoring, the prosecutor's explicit remarks highlighting the defendant's presence and opportunity to "craft his version to accommodate" the State's evidence were unfairly prejudicial to the defendant, requiring reversal. Id. at 101-02.

The Massachusetts Supreme Court has taken a slightly different approach. In Commonwealth v. Gaudette, the Court reaffirmed its pre-Portuondo holding that "it is impermissible for a prosecutor to argue in closing that the jury should draw a negative inference from the defendant's opportunity to shape his testimony

to conform to the trial evidence unless there is evidence introduced at trial to support that argument." 441 Mass. 762, 767, 808 N.E.2d 798 (2004), citing Commonwealth v. Person, 400 Mass. 136, 140, 508 N.E.2d 88 (1987) and Commonwealth v. Beauchamp, 424 Mass. 682, 690-91, 677 N.E.2d 1135 (1997). Because the appellant had not made the claim, Court did not consider the state constitution but instead apparently exercised its supervisory authority. Gaudette, 441 Mass. at 767. The Massachusetts Court emphasized the prosecutor's responsibility to argue "within the bounds of evidence and the fair inferences from the evidence," making clear it would not tolerate what the New Jersey Court termed "generic accusations." Id. at 803 (internal citations omitted). Because the evidence in that case supported the prosecutor's accusations of tailoring (primarily due to inconsistencies between the defendant's testimony and his statements to police and between his testimony and that of others), the Court affirmed the conviction. Id. at 803.

This Court has inherent supervisory powers which it may wield to maintain sound judicial practice. See e.g. State v. Bennett, 161 Wn.2d 303, 306, 165 P.3d 1241 (2007) (using supervisory power to disapprove a WPIC jury instruction); State v.

Fields, 85 Wn.2d 126, 130, 530 P.2d 284 (1975) (using supervisory power to reverse trial court order quashing summons and suppressing evidence obtained thereto); State v. Bonds, 98 Wn.2d 1, 13, 653 P.2d 1024 (1983) ("If ... potential liability does not constitute sufficient deterrence of police officers' making unauthorized excursions into another jurisdiction, let it be understood that we will not hesitate in the future to use our supervisory power to exclude the fruits of such unauthorized excursions").

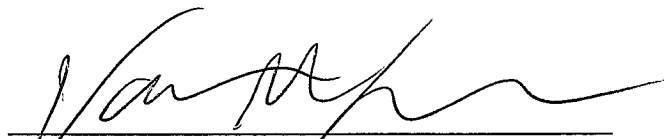
This Court should join New Jersey and Massachusetts in exercising its power to prohibit a practice which severely undermines the trial courts' ability to administer fair and impartial trials. Specifically, this Court should adopt New Jersey's simple and common-sense rule that although a prosecutor may point out inconsistencies or raise questions about a defendant's testimony, the prosecutor may not – in cross-examination, closing argument, or rebuttal – "call the jury's attention to the defendant's presence at trial, a place where the defendant is constitutionally authorized to be." Daniels, 182 N.J. at 99-100.

F. CONCLUSION

For the reasons set forth above, Mr. Martin respectfully requests that this Court reverse his convictions.

DATED this 7th day of October, 2008.

Respectfully submitted,



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# IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
# DIVISION ONE

| | | |
|---|---|---|
| STATE OF WASHINGTON, Respondent, | ) | NO. 61127-5-I |
| TIMOTHY MARTIN, Appellant. | ) | |

## DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 7TH DAY OF OCTOBER, 2008, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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**SIGNED** IN SEATTLE, WASHINGTON, THIS 7TH DAY OF OCTOBER, 2008.

X_____



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